

**19th OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(SEPTEMBER 23, 2024)**

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Dear Members,

A brief update on a judgment by the Supreme Court of Pakistan on “Hearing Notice is a **MUST** even if there is no provision for it” is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our “**CASE LAW UPDATE COMMITTEE**” to apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams M. Ansari or at the Bar’s numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Syed Zafar Ahmed)
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**19th OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(September 23, 2024)**

HEARING NOTICE IS A MUST EVEN IF THERE IS NO PROVISION FOR IT.

Appellate Authority: Supreme Court of Pakistan

Appellants: CIT v. Fazlur Rahman

Section: 33A of the Income Tax Act, 1922 (the Act)

Background: The Taxpayer contested the orders passed against him under section 33A of the Income Tax Act, 1922 on the premise that no opportunity was given to him. The High Court accepted the petition for want of proper notice. The Commissioner challenged the High Court decision before the Supreme Court contending that the proceedings were administrative in nature and opportunity of hearing to the taxpayer was not essential.

First Ruling of the Court:

ASSESSMENT PROCEEDINGS ARE JUDICIAL IN NATURE

The court ruled that proceedings under Section 33A are judicial in nature. It involves the review of orders issued by subordinate authorities and requires the Commissioner to conduct inquiries to make decisions based on legal and factual conclusions. The court did not accept the Commissioner's argument that these proceedings are mere administrative for the reason that under the said section the Commissioner can override the income tax assessment made under an order, which would otherwise mean that an administrative order can supersede the judicial order. Therefore, the proceedings under section 33A of the Act were declared by the court as judicial instead of administrative.

Second Ruling of the Court:

RIGHT OF A PARTY TO BE HEARD

Absence of a specific provision for a notice does not override the principles of natural justice. These principles ensure that a party's rights cannot be affected by an order without giving them an opportunity to be heard. The court further points out that references to notice requirements in other statutes do not negate the necessary requirement for notice in proceedings where no explicit provision exists, underscoring the importance of procedural fairness. The court emphasized that the principle "no man shall be condemned unheard" applies not only to the courts but also to any proceedings affecting the person, property or other rights including tax assessments with the same force.

COMMENTS

The judgment authenticated the necessity of adhering to principles of natural justice specifically the right to a hearing before condemnation. The orders passed by the Commissioner without providing the opportunity of hearing were rendered as invalid. The Supreme Court has given its decision in a very unequivocal terms, relevant extracts of which are being reproduced hereunder:

"We do not think the mere absence of a provision as to notice can override the principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing to that party."

"The principle that 'no man shall be condemned unheard' is not confined to courts but extends to all proceedings, by whomsoever held, which may affect the person, property, or other rights of the parties concerned in the dispute. The maxim applies with no less force to proceedings that affect liability to pay a tax."

CONCLUSION:

There are a number of provisions under the Income Tax Ordinance, 2001 where there is no express provision for sending a notice of hearing before finalizing an order for e.g. Section 162 of the Ordinance. The above cited case law and its narrative drawn here under this One pager case law update should provide the material to our members to contest such an inaction on the part of the department, where such a situation arises.

It is equally critical to mention that the principle of Fair Trial has now been incorporated as a fundamental right under Article 10A of the Constitution of Pakistan after the Eighteenth (18th) Amendment in 2010. The inclusion of Article 10A re-affirms the fundamental principle of proper opportunity of being heard as a means to provide Fair Trial.

DISCLAIMER:

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgment and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings would not be binding on KTBA.

Citation(s): 1964 SLD 48 = (1964) 10 TAX 49 = 1964 PLD 410 = 1964 SCC 176

Supreme Court of Pakistan

Civil Appeals Nos. 12-D and 15-D of 1963, decision dated: 06-03-1964.

**A.R. CORNELIUS CHIEF, JUSTICE, S.A RAHMAN, JUSTICE, FAZLE AKBAR, JUSTICE,
B.Z. KAUS, JUSTICE AND HAMOODUR RAHMAN, JUSTICE**

COMMISSIONER OF INCOME TAX

V.

FAZLUR RAHMAN SAYEEDUR RAHMAN

**A.F.M. Mesbah-ud-Din, Advocate, Supreme Court, instructed by Abdul Matin Khan,
Attorney, for the Appellant. Asrarul Hossain, Senior Advocate, Supreme Court
(K.M. Subhan, Advocate, Supreme Court, with him) instructed by Muhammad
Nurul Huq, Attorney, for the Respondent.**

Law: Income Tax Act, 1922

Section: 33A

Law: Income Tax Ordinance, 1979

Section: 138(1)

Income-tax Act, 1922 -Section 33A -- Revision order passed by the Commissioner of Income-tax -Whether judicial or administrative -Held judicial -Order passed without allowing an opportunity of hearing to the applicant -Order, whether sustainable in law -Held no --

Corresponding Sections:

Income-tax Ordinance, 1979 -Section 138(1) --

THIS JUDGMENT DELIVERED BY: B. Z. KAIKAUS, JUSTICE: -----

This judgment will dispose of Appeals Nos. 12-D and 15-D of 1963, the question of law involved in both of which is the same.

In each of these two cases the respondent had been assessed to income-tax for the assessment year 1954-55, 1955-56 and 1956-57 on the basis that he was "ordinarily resident" in Pakistan. The position of the respondent in each case was that he was resident in Pakistan, but not "Ordinarily resident" and therefore the agricultural income which accrued to him in India should not have been included in his total income. The respondents filed four applications under section 33A of the Income-tax Act, three against the assessment orders for the years mentioned above and the fourth against a revised assessment order, before the Commissioner of Income-tax. The Commissioner without giving the respondents a hearing dismissed the applications holding that the respondent was in fact ordinarily resident in Pakistan. Against this order of the Commissioner of Income-tax two writ petitions were filed in the High Court it was contended on behalf of the Commissioner of Income-tax that the order passed under Section 33A was an administrative order and it was not necessary to hear the party who had filed the application. This contention was rejected by the learned Judges of the High Court who held that the proceedings under Section 33A were quasi-judicial and not administrative and were illegal and ineffective for want of proper notice. These two appeals by special leave have

been filed by the Commissioner of Income-tax. It is contended on behalf of the Commissioner of Income-tax that proceedings under Section 33A are administrative in nature and in any case an opportunity of hearing to the applicant is not essential.

Section 33A was introduced into the Income-tax Act by an assessment in 1941. Before 1941 this provision was contained in Section 33 of the Act which ran:

"33.-(1) any assessee objecting to an order passed by

(a) an Income-tax Officer in any case to which the second proviso to sub-section (1) of section 30 applies.

(b) an Appellate Assistant Commissioner under Section 28, section 30 or Section 31, or

(c) an Inspecting assistant Commissioner under Section 34A may appeal to the Appellate Tribunal within sixty days of the date on which such order is communicated to him.

(2) The Commissioner may, if he objects to any order passed by an appellate Assistant Commissioner under Section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made (within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner).

(2A) The Tribunal may admit an appeal after the expiry of the sixty days referred to in sub-sections (1) and (2) if it is satisfied that there was sufficient cause for not presenting it within that period.

(3) an appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall except in the case of an appeal referred to in such sub-section (2), be accompanied by a fee of one hundred rupees.

(3A) The Appellate Tribunal may, before disposing of any appeal, call for such particulars as it require respecting the matters arriving in the appeal or cause further inquiry to be made by the income tax Officer.

(4) (a) The Appellate Tribunal shall give both parties to the appeal an opportunity of being heard.

(b) If the Appellate Tribunal is not satisfied that the assessment or order which is the subject of appeal ought to be interfered with, it shall reject the appeal and the assessment or order shall stand good.

(c) If the Appellate Tribunal is satisfied that an assessment which is the subject of appeal ought to be reduced or annulled it shall reduce or annul the assessment accordingly.

(d) If the Appellate Tribunal is satisfied that an assessment which is the subject of appeal is insufficient, it shall increase the assessment accordingly.

(e) If the Appellate Tribunal is satisfied that an assessment which is the subject of appeal ought to be set aside, the assessment and direct the Income-tax Officer to make a fresh assessment.

(f) As respect any other matter, if the Appellate Tribunal is satisfied that an order which is

the subject of appeal ought to be interfered with, it shall cancel or vary the order accordingly and shall issue such consequential directions, as the case may require. In the case of an order imposing a penalty the power to vary the order shall include the power to enhance the penalty.

(g) The appellate Tribunal shall communicate its order on the appeal to the assessee and to the Commissioner.

(5) Whereas the result of an appeal any change is made in the assessment of a firm or association of person or a new or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.

(6) Save as provided in Section 66 orders passed by the appellate Tribunal on appeal shall be final.

Section 33A runs:

"33A.-(1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:-

Provided that the Commissioner shall not revise any order under this sub-section if-

(a) Where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired; or

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an appeal to the Tribunal: or

(c) the order has been made more than one year previously:

Provided further that the Commissioner may, for reasons to be recorded by him in writing, also revise under this sub-section any order made more than one year previously.

(2) The commissioner may, on application by assessee for revision of an order under this Act passed by any authority subordinate to the Commissioner made within one year from the date of order (or within such further period as the Commissioner may consider fit to allow on being satisfied that the assessee was prevented by sufficient cause from making the application within that period), call for the record of the proceeding in which such order was passed, and on receipt of the record may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if-

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner; or

(c) the order has been made the subject of an appeal to the Appellate Tribunal;

Provided further that an order by the Commissioner declining to interfere shall be deemed not to be an order prejudicial to the assessee.

(3) Every application by an assessee under sub-section (2); shall be accompanied by a fee of twenty-five rupees."

It will be observed that the provision in its original as well as in amended form gives the Commissioner power to interfere with an order passed by any authority subordinate to him. As it has been conceded on behalf of the Commissioner of Income-tax that the proceedings under Section 33 were judicial in nature and it is only in respect of Section 33A that proceedings are alleged to be administrative it will be proper to state the points of difference between the two provisions. Under Section 33 the Commissioner could even pass an order against the assessee after notice to him but under Section 33A he cannot pass an order against the assessee at all. In Section 33 there was no provision for an application by the assessee while the amended provision enables the assessee to put in an application on payment of Rs. 25 as court-fees. In Section 33 there was no condition as to time or as to the pendency of any appeal. The sole basis of the argument put forward on behalf of the Commissioner of Income-tax as to the distinction in the nature of the proceedings under Sections 33 and 33A is the fact that under Section 33A no orders can be made against the assessee.

Having regard to the nature of the jurisdiction that is conferred by Section 33A it is not quite easy to appreciate how an order under this section could be an administrative order. Admittedly the order with which the Commissioner of Income-tax interferes with when exercising jurisdiction under Section 33A, that is, the order of assessment by the Income-tax Officer or the appellate order of the Appellate Assistant Commissioner, is a judicial order. That a judicial order should be set aside by means of an administrative order is a concept as yet unknown to our system of jurisprudence. Administrative orders may be set aside by judicial orders, but no provisions of any law has been cited of a reverse case. The Commissioner of Income-tax while dealing with an application under Section 33A has to base his decision on conclusions of fact or law which conclusions (when they interfere with the order of the subordinate authority) override similar conclusions reached by the Income-tax Officer or the Appellate Assistant Commissioner and it is not easy to contend that a conclusion of law or fact not reached in a judicial manner can supersede by one reached in a judicial manner. The remedy under Section 33A is alternative to an appeal before the Appellate Assistant Commissioner or the Appellate Tribunal and should be similar in nature. In a case where the assessee acquires the right to file an application under Section 33A by waiving right of appeal it will not be reasonable that he should not get the same remedy from the Commissioner of Income-tax as he could have had from the Appellate Authority. By the amendment a right has been given to the assessee to file an application. He has to pay for this application a court-fee of Rs.25 which would mean that he has a right to get a decision from the Income-tax Commissioner on the points which he has raised. The Commissioner can make an inquiry or cause an inquiry to be made before he passes an order. There is nothing in the Income-tax Act, to show this inquiry which affects valuable rights has not to be judicial. The argument put forward on behalf of the Commissioner of Income-tax namely that because an order cannot be passed against the assessee therefore the proceedings are not judicial is not supported by any authority or any principle of

interpretation. The fact that a Tribunal cannot pass an order of particular kind does not necessarily involve that the proceedings which would otherwise be judicial cease to be so. The High Court sitting in revision under the Criminal Procedure Code against an order of acquittal cannot pass an order of conviction.

It is necessary to discuss the matter at any great length because of what is contained in Section 37 of the Income-tax Act. This section provides that the Commissioner of Income-tax shall for the purpose of Chapter IV (Section 33A occurs in Chapter IV) have the powers of a Court and that any proceedings before a Commissioner under this chapter shall be a judicial proceeding. Section 37 appears not to have been brought to the notice of the High Court in the present case. In view of the wording of this section it is not necessary to refer to cases cited at the bar by the appellant which do not refer to this section. Those cases are generally based on an observation made by the Privy Council in *Commissioner of Income-tax v. Tribunal Trust, Lahore* {P.L.D. (1947) 247 (P.G.)}. The questions which we are now considering did not arise in that case. An observation had however been made while dealing with Section 33 that this section was intended to provide administrative machinery by which a higher executive officer may review the Acts of his subordinates and take the necessary action upon such a review". The mere fact that the officers dealing with particular matter were administrative officers does not necessarily mean that their acts were not judicial. The question before the Privy Council being a different one the observations have to be read in the context in which they appear.

On behalf of the appellant it is urged that even if the order passed under Section 33A be a judicial order it does not necessarily imply that notice to the respondent of the hearing of the application under Section 33A was essential. Reliance is placed in this connection on Section 31 of the Income-tax Act which provides for notice of the hearing of the appeal to the appellant. It is urged that the existence of a provision for notice in section 31 and its absence in Section 33 should lead to the inference that notice of the hearing of the application under Section 33A to the applicant was not needed. The logical result of the acceptance of this argument should be that notice of hearing should never be necessary unless it is specially provided for because if this argument be valid by comparison of two sections of the statute it should also be valid by comparison of provisions in different statutes on the ground that the Legislature, when it intends notice makes an express provision. We do not think the mere absence of a provision as to notice can override the principle of natural justice that that an order affecting the rights of a party cannot be passed without an opportunity of hearing to that party. A reference to provisions in other statutes will show that the existence of a provision of notice as to one proceeding has not been accepted as an argument against the need of notice in the case of proceeding with respect to which there is no express provision of notice. Under the Criminal Procedure Code there is a distinct provision in the case of an appeal for notice of hearing to the appellant, but there is no such provision in the case of revision petition in the High Court. It cannot be urged, however that the right of hearing in a revision petition has thereby been excluded. In the civil Procedure code similarly there is a provision in Order XLI, rule 22 directing notice of the hearing of appeal to be given to the appellant and there is no such provision with respect to a proceeding under Section 115, C.P.C., yet it cannot be said that it is not necessary to hear the parties affected in a proceeding under Section 115, C.P.C. The fact that the proceedings are judicial or quasi-judicial in nature is sufficient to entitle a party to a hearing in the absence of a specific provision to the contrary.

At the same time it should be pointed out that the right to be heard is not confined to proceedings which are judicial in form. As has been held by this Court in *The Chief Commissioner, Karachi v. Mrs. Dina Sohrab Katrak* {(1959) P.L.D 45 (S.G.)} the maxim "no man shall be condemned unheard" is not confined to Courts but extends to all proceedings,

by whomsoever held which may affect the person or property or other right of the parties concerned in the dispute, and the maxim will apply with no less force to proceeding which affect liability to pay a tax.

We hold that an opportunity of hearing was essential and in its absence the order of the Commissioner of Income-tax is void. These two appeals are dismissed but there is no order as to costs.